

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

FILE: WAC-02-242-52336 Office: CALIFORNIA SERVICE CENTER Date: **DEC 28 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Persian music nightclub. It seeks to employ the beneficiary permanently in the United States as a songwriter for a Persian language rap group. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 6, 2000. The proffered wage as stated on the Form ETA 750 is \$32,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of December 1998.

On the petition, the petitioner claimed to have been incorporated in 1999, to have a gross annual income of \$693,916, and to currently employ ten workers. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 22, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested signed and complete tax returns from 2000 to the present as well as proof of any wages paid to the beneficiary.

In response, the petitioner submitted an unaudited balance sheet for the period ending September 30, 2002, and its Forms 1120S, U.S. Income Tax Returns for an S Corporation for the years 2000 and 2001.

The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>
Net income ¹	\$40,000	-\$9,292
Current Assets	-\$16,994	-\$29,067
Current Liabilities	\$44,561	\$27,672
Net current assets	-\$61,555	-\$56,739

In addition, former counsel submitted copies of checks from the petitioner made payable to "Sandy" in amounts totaling \$9,200 in 2002, \$9,500 in 2001, \$10,000 in 2000, \$8,800 in 1999², and \$4,400 in 1998³; and copies of checks from the petitioner made payable to the beneficiary in amounts totaling \$28,500 in 2002, \$28,100 in 2001, \$29,000 in 2000, \$28,500 in 1999, and \$9,500 in 1998. Former counsel also submitted a letter stating that the beneficiary "worked as a musician, and was paid by performances, and not as an employee. Thus, there are no DE-6 Quarterly Wage Reports covering him. The O-1 petition shows that he was to be paid by performances, not a weekly wage." Former counsel referenced the copies of checks made payable to "Sandy" and the beneficiary and explained that "Sandy" is the name of the beneficiary's group. Finally, former counsel stated that "[the beneficiary] spent 40 hours per week writing and practicing, but was paid only by the performance as specified in the O-1 applications."

On March 31, 2003, the director requested evidence that the beneficiary complied with National Security Entry-Exit Registration System (NSEERS) and received a copy of the beneficiary's I-94 card demonstrating that he had in response.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 13, 2003, denied the petition. The director noted that there was no evidence the checks made payable to the beneficiary and "Sandy" were actually cashed and the petitioner's net loss and negative net current assets in 2001 precluded a determination that the petitioner had established its continuing ability to pay the proffered wage.

On appeal, substituted counsel asserts that the beneficiary and his group was actually paid more than the proffered wage each year and the petitioner may cut "Sandy" or other entertainers in future years. The petitioner submits its 2002 corporate tax return; its ledgers from 2000 through 2002 illustrating payments made to employees and entertainers; and Forms 1099 for 2000 through 2002 for its entertainers, including the beneficiary and the individuals making up the group "Sandy." "Sandy" is comprised of four entertainers in 2002, and three members in 2001 and 2000 in addition to the beneficiary.

Additionally, the petitioner submits a letter explaining that it cashes endorsed checks for its employees and entertainers, recording these cashed checks on its internal ledger, and that is why it cannot produce bank transaction codes demonstrating the checks were cashed. The petitioner submits a list of "Sandy's" group members' receipt of wages for 2002, 2001, and 2000 in the total amounts of \$9,150, \$10,700, and \$10,000,

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

² Any evidence preceding the priority date is not necessarily dispositive to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

³ See footnote 2, *supra*.

respectively.⁴ The petitioner also submits unaudited income statements for the 12 months ended December 31, 2002 and 2001. The Form 1099, Miscellaneous Income, issued by the petitioner to the beneficiary, in 2002 confirms that he was paid \$28,500. The Form 1099, Miscellaneous Income, issued by the petitioner to the beneficiary, in 2001 confirms that he was paid \$28,100. The Form 1099, Miscellaneous Income, issued by the petitioner to the beneficiary, in 2000 confirms that he was paid \$29,000.

The petitioner's 2002 tax return reflects the following information:

	<u>2002</u>
Net income ⁵	\$47,518
Current Assets	-\$8,293
Current Liabilities	\$18,220
Net current assets	-\$26,513

At the outset, the unaudited financial statements that former counsel submitted in response to the director's request for evidence and substituted counsel submits on appeal are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the unaudited balance sheet for the period ending September 30, 2002 and income statements for the 12 months ended December 31, 2002 and 2001 will not be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2000, 2001, or 2002. Instead, the petitioner has established that it paid the beneficiary wages in the amounts of \$28,500 in 2002, \$28,100 in 2001, and \$29,000 in 2000. Thus, the petitioner must demonstrate that it can pay the remaining wages of \$3,500, \$3,900, and \$3,000, for 2002, 2001, and 2000, respectively.

⁴ These amounts are broken down into parts paid to each group member for each year on a summary worksheet provided by the petitioner on appeal. The amounts for 2000 and 2001 conflict with the AAO's calculations as stated above. However, the Forms 1099, Miscellaneous Income, issued by the petitioner to each beneficiary listed by the petitioner as party of "Sandy" in 2002 on a summary worksheet submitted on appeal corroborate the amounts received as parts of income contributing to the total of \$9,150 in 2002. The petitioner's ledger and Form 1099, Miscellaneous Income, however, have one conflicting report of wages paid for Shaid Shahrokh, a member of "Sandy" in 2002. The ledger indicates that he was paid a total of \$5000 in wages but the Form 1099 indicates that he was paid \$3,000 as the petitioner states in a summary worksheet. Because the Forms 1099 corroborate the totals of \$9,150, \$10,700, and \$10,000, for 2002, 2001, and 2000, respectively, the AAO will use those figures in its analysis accordingly.

⁵ Ordinary income (loss) from trade or business activities as reported on Line 21.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's net income was \$40,000, -\$9,292, and \$47,518 in 2000, 2001, and 2002, respectively. The petitioner's net income in 2000 and 2002 covers the remaining proffered wages in each year and thus demonstrates the petitioner's ability to pay the proffered wage in those years. However, the petitioner did not demonstrate its ability to pay the proffered wage out of its net income in 2001 as it reported a loss.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2001, however, were negative. As such, the petitioner cannot prove its ability to pay the proffered wage out of its net current assets in 2001.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2000. In 2000, however, the petitioner shows sufficient net income to pay the difference between the wage paid and the proffered wage out of its net income. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 2000.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a loss in net income and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2002. In 2002, however, the petitioner shows sufficient net income to pay the difference between the wage paid and the proffered wage out of its net income. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 2002.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. With respect to counsel's appellate arguments, the money spent towards paying the "Sandy" group members represent funds already spent and unavailable for use to contribute towards funds to pay the beneficiary's proposed salary for the year 2001. Additionally, there is insufficient evidence in the record of proceeding to demonstrate that the petitioner will terminate "Sandy" or other employees and use those savings towards future payments of the beneficiary's salary. The petitioner has not stated unequivocally who will be terminated, not who might be terminated, and why those terminations would occur with the permanent hiring of the beneficiary. Regardless, the petitioner is proposing a speculative, prospective means to prove its ability to pay, which does not apply to 2001. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner is not proposing replacing similar employees when it may hire the beneficiary; instead, it is proposing the possible termination of ancillary staff in the future.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO also notes that it is questionable that the employment offer to the beneficiary is permanent and full-time since former counsel conceded that the beneficiary is paid by performance and not for the time he spends composing music and lyrics. It is not clear the petitioner is offering a full-time, 40 hour per week schedule, from 1:00 to 9:00 p.m. according to the terms of the ETA 750A. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). This is an additional reason for dismissal and would require explanation from the petitioner in any additional proceedings in this matter.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.